

## MINORITY VIEWS

### H.R. 2728 – “Occupational Safety and Health Small Business Day in Court Act of 2003”

H.R. 2728 weakens enforcement of OSHA by allowing employers to drag out the imposition of penalties and the date for taking corrective action ordered by safety officials. The principle purpose of the Occupational Safety and Health Act (OSH Act) is “to assure so far as possible every working man and woman in the Nation safe and healthful working conditions” and to encourage the prompt abatement of safety and health hazards. The timeframes in the Act are intended to reduce the occurrence of occupational injury by ensuring that hazards are redressed in a timely manner. H.R. 2728 creates an exception to those timeframes where an employer fails to contest an OSHA citation, pursuant to section 10(a) of the OSH Act, or fails to abate a hazard in a timely manner, pursuant to section 10(b) of the OSH Act.

H.R. 2728 amends the section 10(a) and (b) of the OSH Act to provide that an employer who has failed to contest a citation and proposed penalty (section 10(a)) or has failed to contest a notification of failure to correct a violation (section 10(b)) in a timely manner (within 15 working days of receiving the notice) may still contest the citation (or failure to correct notice) if the failure to contest in a timely manner was due to a “mistake, inadvertence, surprise, or excusable neglect.” Notwithstanding the bill’s title, the “Occupational Safety and Health Small Business Day in Court Act,” this bill has nothing to do with small businesses, *per se*, but applies to all OSHA regulated businesses regardless of size.

The intent of the bill is to overturn a single case in a single circuit, *Chao v. Russell P. Le Frois Builder, Inc.* (United States Court of Appeals for the Second Circuit, May 10, 2002). As the Majority Views state, *Le Frois Builders* is directly contradicted by an earlier Third Circuit decision, *J.I. Hass Co. v. OSHRC*, 648 F.2d 190 (3d Cir. 1981). As clearly stated in *Secretary of Labor v. Villa Marina Yacht Harbor*, and to quote from the Majority Views, “the [Occupational Safety and Health Review Commission] has the authority to relieve employers from judgments.” (See Majority Views, discussion of the *Villa Marina Yacht* Case.) In fact, though the Majority neglects to mention it, no other circuit court has ruled similarly to *Le Frois Builders*. Even assuming that H.R. 2728 was appropriately drafted, an assumption we do not concede, the need for this legislation has not been established.

The bill’s proponents state that their intent is to enable OSHRC to waive a statute of limitations in the same way that a federal court may pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. But the bill provides no reference to Rule 60, it simply says that the Review Commission may allow an employer to challenge an OSHA citation, even though it has been properly served by the agency and even though the employer has failed to challenge the citation, so long as the employer’s failure is due to “mistake, inadvertence, surprise, or excusable neglect.” The best that can be said is that this language is similar to part of Rule 60.

Rule 60 also requires that the motion for relief must be made within a reasonable time and not more than one year after the judgment, order, or proceeding was entered or taken. Given the fact that hazards may not be abated and there may well be continuing risks to safety and health, allowing a citation to be litigated a year after it has been issued is a troubling prospect. But H.R.

2728 does not incorporate a requirement that the motion be filed in a timely manner nor does it impose the one-year limitation. Without specific reference to Rule 60, there is no assurance that the court decisions that have otherwise circumscribed the application of that rule would be applicable to this legislation.

The bill also waives the time limits as they apply to employers, but not as they apply to workers. While the bill amends subsections 10(a) and 10(b) of the OSH Act, H.R. 2728 does not amend subsection 10(c) which affords workers the right to challenge the abatement period. If an employer fails to respond to a complaint, this bill provides a second bite at the apple. If an employer fails to respond to a citation for a failure to correct a hazard, this bill provides a second bite at the apple. But one bite is enough for workers. If they fail to challenge the abatement period established by the Secretary in a timely manner, well that is their tough luck.

H.R. 2728 also encourages employers to litigate citations rather than to promptly correct health and safety hazards. Allowing an employer to belatedly challenge a complaint also allows an employer to delay when he or she must correct a health or safety hazard. Under this legislation, the responsibility to correct a health hazard may be indefinitely delayed. Even though the employer has failed to challenge a citation or a failure to abate notice in a timely manner, if that failure is due to “mistake, inadvertence, surprise, or excusable neglect” the employer can nevertheless challenge the citation, does not have to abate the hazard during the challenge period, and is not liable for having failed to abate in the interim period. The Majority appears to equate an OSH Act proceeding with any other typical proceeding. In fact, however, much more is at stake. What is at stake is not merely whether an employer will pay a monetary fine, but whether workers will have a safe and healthy workplace or be subject to injury, illness, and death. This legislation should be rejected.

## MINORITY VIEWS

### H.R. 2729 – “Occupational Safety and Health Review Commission Efficiency Act of 2003”

We oppose H.R. 2729. H.R. 2729 amends section 12 of the Occupational Safety and Health Act of 1970 (OSH Act) to expand the Occupational Safety and Health Review Commission (OSHRC) from three members to five members. The bill also appears to require that Commission members have legal training and provides that the President may extend the term of a member until the Senate has confirmed a successor.

The Commission has functioned with three members since its establishment in 1970. The authors of the OSH Act did not feel there was sufficient work to justify five members and experience does not demonstrate otherwise. The Majority states: “While there are similarities between the mission of MSHA [the Mine Safety and Health Administration] and OSHA [the Occupational Safety and Health Administration], there is one significant difference: the composition of the adjudicative commission tasked with adjudicating disputes between employers and the agency.” (See Majority discussion under the subtitle “Increasing the Membership of OSHRC from Three to Five.”) It is true that the Mine Safety and Health Review Commission (MSHRC) has five members, while OSHRC only has three. However, it is also true that MSHRC has broader responsibilities, including responsibility for resolving whistleblower complaints, than does OSHRC. The Majority wants to expand the size of OSHRC to make it commensurate with MSHRC, but is unwilling to give OSHRC commensurate duties.

While expanding the Commission from three to five members, H.R. 2729 neither permits the creation of sub panels nor changes the statutory definition of a Commission quorum. As introduced, H.R. 2729 authorized the establishment of sub panels. Concern had been expressed, however, that, as introduced, the bill authorized the Review Commission Chairperson to establish sub panels but did not ensure that the creation of sub panels would be random and impartial, as is the case at the National Labor Relations Board or within the Courts of Appeal. Whether it was as a result of that concern is uncertain, but the Manager’s amendment adopted in Committee deleted those provisions authorizing sub panels. Consequently, as reported by the Committee, H.R. 2729 would create a unique circumstance in which a minority of the Commission would constitute a quorum. This seems a very serious flaw.

The addition of the word “legal” as a modifier to training is also problematic, even nonsensical. The OSH Act requires that the President considers the “training, education, and experience” of potential Review Commission nominees. If enacted, H.R. 2729 would require the President to consider the “*legal* training, education, and experience” of potential nominees. The Majority states that “the requirement that training be legal in character will not prevent the selection of any other qualified individual whose experience and/or education is of a nature to qualify him or her for service on OSHRC.” (See Majority discussion under the subtitle “Other Necessary Remedial Actions.”) In other words, the addition of the word “legal” does not restrict the President to only appointing those with legal training. The President may still appoint individuals exclusively on the basis of their experience or education, even if they do not have “legal training.” The effect then of adding the word “legal” as a modifier of “training” is only to limit the kind of training that the President may consider. Of course, that makes no sense

whatsoever. Current law, which does not preclude the President from considering legal training or even legal education among all other types of training or education, seems preferable to H.R. 2729 which arbitrarily limits the kinds of training the President may consider. Health and safety experts, who may not have legal training but who may nevertheless be very knowledgeable about the OSH Act and agency and Commission procedures, may be unfairly and unwisely excluded from consideration for positions on the Commission. The Commission and workers' health and safety would suffer from such an arbitrary exclusion of non-lawyer talent and expertise.

## MINORITY VIEWS

### **H.R. 2730 – “Occupational Safety and Health Independent Review of OSHA Citations Act of 2003”**

This bill would give the Occupational Safety and Review Commission policy making authority by allowing courts to give deference to the Commission regarding the interpretation of OSHA standards. This change would undermine the Department’s enforcement functions by encouraging challenges to the Secretary’s rules and interpretations.

The Secretary is much better positioned to interpret her regulations than the Commission. Beyond the obvious fact that she issued the regulation in the first instance, as noted by the Court, it is the Secretary who has broader contact, and consequently greater expertise, with both the regulated community and with the impact of regulations on the community. Further, viewing the Commission’s authority as being similar to those of a court fully achieves the purpose of protecting the regulated community from biased interpretations of the Secretary’s authority. Finally, contending the Commission should have both adjudicatory and rulemaking authority, as the Majority does, creates unnecessary and unwarranted confusion by leaving two agencies responsible for determining policy. For all of these reasons, we conclude that the Court’s view of the Act is more reasoned and more sensible than is the Majority’s. H.R. 2730 is not consistent with the OSH Act’s legislative history and does not reflect sensible policy.

In *Martin v. OSHRC*, the Court specifically considered the issue of whether the Secretary or the Commission should receive deference regarding reasonable but conflicting interpretations of an ambiguous regulation promulgated by the Secretary. The Court concluded that based upon the Occupational Safety and Health Act’s legislative history and the Act’s split enforcement structure, it must be inferred that the power to render authoritative interpretations of the Secretary’s regulations is a necessary adjunct of the Secretary’s rulemaking and enforcement powers.

The Court noted the “unusual regulatory structure established by the Act” under which the Secretary was granted enforcement and rulemaking powers, while the Commission was afforded adjudicative powers.

[W]e now infer from the structure and history of the statute that the power to render authoritative interpretations of the OSH Act regulations is a “necessary adjunct” of the Secretary’s powers to promulgate and to enforce national health and safety standards. The Secretary enjoys readily identifiable structural advantages over the Commission in rendering authoritative interpretations of OSH Act regulations. Because the Secretary promulgates these standards, the Secretary is in a better position than is the Commission to reconstruct the purpose of the regulations in question. Moreover, by virtue of the Secretary’s statutory role as enforcer, the Secretary comes into contact with a much greater number of regulatory problems than does the Commission, which encounters only those regulatory episodes resulting in contested citations. Consequently, the Secretary is more likely to develop the expertise relevant to assessing the effect of a particular regulatory interpretation. Because historical familiarity and policymaking expertise

account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court, we presume here that Congress intended to invest interpretative power in the administrative actor in the best position to develop these attributes. *Martin v. OSHRC*, 499 U.S. at 152, 153 (citations omitted).

Citing the Senate Committee Report (S. Rep. No. 91-1282, p.8), the Court noted that Congress intended “to hold a single administrative actor politically ‘accountable for the overall implementation of that program’” and that granting authority to the Commission “to make law by interpreting [standards] would make *two* administrative actors ultimately responsible for implementing the Act’s policy objectives...” *Martin v. OSHRC*, 499 U.S. 499 at 153, 154 (emphasis in original).

Insofar as Congress did not invest the Commission with the power to make law or policy by other means, we cannot infer that Congress expected the Commission to use *its* adjudicatory power to play a policymaking role. Moreover, when a traditional, unitary agency uses adjudication to engage in lawmaking by regulatory interpretation, it necessarily interprets regulations that *it* has promulgated. This, too, cannot be said of the Commission’s power to adjudicate. *Martin v. OSHRC*, 499 U.S. at 154 (emphasis in original).

The Court concluded, correctly in our view, that:

Congress intended to delegate to the Commission the type of non-policymaking adjudicatory powers typically exercised by a *court* in the agency-review context. Under this conception of adjudication, the Commission is authorized to review the Secretary’s interpretations only for consistency with the regulatory language and for reasonableness. In addition, of course, Congress expressly charged the Commission with making authoritative findings of fact and with applying the Secretary’s standards to those facts in making a decision. *Martin v. OSHRC*, 499 U.S. at 154, 155 (emphasis in original).

... We harbor no doubt that Congress also intended to protect regulated parties from biased interpretations of the Secretary’s regulations. But this objective is achieved when the Commission, and ultimately the court of appeals, reviews the Secretary’s interpretation to assure that it is consistent with the regulatory language and is otherwise *reasonable*. Giving the Commission the power to substitute *its* reasonable interpretations for the Secretary’s ... would also clearly frustrate Congress’ intent to make a single administrative actor “accountable for the overall implementation” of the Act’s policy objectives ... *Martin v. OSHRC*, 499 U.S. at 156 (emphasis in original).

... [A]lthough we hold that a reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary; we emphasize that the reviewing court should defer to the Secretary only if the Secretary’s interpretation is reasonable. *Martin v. OSHRC*, 499 U.S. at 158.

## MINORITY VIEWS

### **H.R. 2731 – “Occupational Safety and Health Small Employer Access to Justice Act of 2003”**

#### ***H.R. 2731 Will Severely Limit the Ability of the Occupational Safety and Health Administration to Protect Workers***

H.R. 2731 is a blatant attempt to chill OSHA’s exercise of statutory responsibility to enforce the OSH Act, by penalizing the agency for every instance in which it attempts to do so unsuccessfully. Instead of encouraging cooperation between employers and OSHA, H.R. 2731 encourages defendants to litigate matters with OSHA, resulting in fewer settlements, lengthier litigation, and ultimately delaying compliance with the OSH Act. Enactment of H.R. 2731 would put the safety and health of thousands of workers at risk.

H.R. 2731, the “Occupational Safety and Health Small Employer Access to Justice Act” seeks to reverse the American Rule, under which each party to litigation pays its own costs, in a single class of cases, namely, those in which the Occupational Safety and Health Administration (OSHA) does not prevail in administrative or judicial proceedings against an employer or labor organization with not more than 100 employees and a net worth of not more than \$7 million. Workers have no private right of action under the Occupational Safety and Health Act (OSH Act). Consequently, workers rely on OSHA to protect their rights to a safe and healthful workplace. If OSHA is deterred from bringing cases it is not guaranteed to win, workers’ rights and their health and safety would be severely eroded.

The Majority has failed to provide any evidence that OSHA has abused its statutory authority in issuing and prosecuting complaints. The Majority has also failed to show that the Equal Access to Justice Act provides insufficient redress to respondents who prevail in proceedings before the Occupational Safety and Health Review Commission (OSHRC).

Proponents of H.R. 2731 do not attempt to suggest that the costs imposed by H.R. 2731 would be offset by additional appropriations to the Department of Labor. As a consequence, the additional costs imposed by H.R. 2731 must ultimately come at the expense of agency efforts to deter and remedy violations of the law. Furthermore, H.R. 2731 requires taxpayers to underwrite the expense of employer violations. H.R. 2731 requires OSHA to pay employers’ attorney’s fees for any part of a case it does not win. As such, if an employer loses ten claims, but wins one, an employer may claim entitlement to payment as a prevailing party and taxpayers would be responsible for the bill.

Congress has considered similar legislation before. In the 105<sup>th</sup> Congress the Committee reported H.R. 3246 which, among other provisions, would have required the National Labor Relations Board (NLRB) to pay the attorney’s fees and costs of employers or unions with not more than 100 employees and a net worth of not more than \$1.4 million if the agency did not prevail. H.R. 3246 very narrowly passed the House on a 202-200 vote and died in the Senate. In the 106<sup>th</sup> Congress the Committee reported H.R. 1987 which required the NLRB and OSHA to pay attorney’s fees and costs in any case in which they do not prevail to employers (exclusively

in the case of OSHA) and unions with not more than 100 employees and a net worth of not more than \$7 million. H.R. 1987 was reported by Committee on a party-line vote and was scheduled for floor consideration, but ultimately was never brought up on the floor. This type of legislation has come to be known as “loser pays” legislation, but that is a misnomer. Under H.R. 2731, as was the case with the previous bills, there is only one set of losers. If OSHA does not prevail, no matter how reasonable its case, the taxpayers pay the employer’s costs. The reverse does not also hold true, however. If OSHA wins the case, the employer is not required to pay OSHA’s costs, no matter how weak the employer’s case nor how blatant or egregious the employer’s violation was. In other words, the loser under “loser pays” legislation is the taxpayer.

### **H.R. 2731 Is Not Limited to Small Businesses**

H.R. 2731, despite its stated intent to apply to “small businesses,” achieves far broader coverage with its enlarged net worth and employee requirements. Bureau of Labor Statistics data for the first quarter of 1998 show that there were over 6.5 million private sector establishments with 99 or fewer employees, employing 55 million workers, 54% of the private sector workforce. These establishments comprise the vast majority of American businesses- about 97%.<sup>[1]</sup> In contrast, Congress traditionally defines “small business” for the purpose of establishing coverage under a wide range of employment-related laws by imposing a far smaller ceiling on the size of the workforce. The Age Discrimination in Employment Act, for example, applies to employers who have “twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.”<sup>[2]</sup> Similarly, the Americans with Disabilities Act covers employers with fifteen or more employees, 42 U.S.C. 2111(5), as does Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e (b). Thus, the Majority’s definition of “small business” in H.R. 2731 serves a rhetorical purpose only; in practice, it achieves nearly-universal coverage.

### **H.R. 2731 Is Unsupported By the Evidence**

Moreover, there is no evidence to justify this radical departure from the American Rule, under which each party to litigation bears its own costs. The Majority has come forward with nothing to demonstrate that OSHA’s prosecutorial discretion should be changed in this manner. Indeed, the statistics demonstrate otherwise. As was stated in 2000:

OSHA statistics also undermine the contention that OSHA has engaged in a practice of prosecutorial abuse. According to the Majority’s views, out of nearly 77,000 total violations cited in fiscal year 1998, only 2,061 inspections resulted in citations that were contested. Once again, the facts have condemned the Majority’s case. In FY ’98, Federal OSHA conducted more than 34,000 inspections, 16,396 of which resulted in citations at workplaces with fewer than 100 employees. Sixty percent of these citations were settled between OSHA and the employer in informal conferences. Employers contested 1,275 or 8% of the citations before the Occupational Safety and Health Review Commission. Moreover, in FY ’98 nineteen (19) OSHA enforcement cases were decided by Federal appellate courts. OSHA won a total of 77 percent of these cases (Most of which had originated several years before FY ’98).<sup>[3]</sup> These numbers suggest that OSHA

neither issues citations nor enters into litigation against employers in a capricious manner. (H.Rpt. 106-385, To Accompany H.R. 1987, Minority Views)

Since OSHA either settles or wins the vast majority of enforcement cases, there is no justification for assuming that employers need to be protected against an overzealous prosecutorial agency. Instead of encouraging cooperation between employers and OSHA, H.R. 2731 encourages defendants to litigate. Fewer settlements and lengthier litigation would delay compliance with the OSH Act. This would come at a time when OSHA's commitment to the protection of millions of American workers has had a tremendous impact on reducing occupational injuries, illnesses and death. As such, attempting to alter the agency's prosecutorial discretion could prove to be extremely counterproductive and disastrous to millions of workers.

### **Small Employers Are Already Entitled to Recovery of Legal Fees under EAJA**

Not only is there a total lack of evidence of OSHA abuses that would warrant this unprecedented shifting of fees in OSHA litigation, but there is already a remedy for parties that prevail in litigation involving the Board, namely the Equal Access to Justice Act (EAJA).<sup>[4]</sup> We are unaware of any concerns expressed by the Government Reform or Judiciary Committees, the Committees which have responsibility for assessing the law, which EAJA is failing to achieve Congressional intent. Nor is there any evidence that EAJA works differently at OSHA than it does in any other agency. Indeed, a GAO Report that the Majority cited extensively to justify earlier legislation similar to H.R. 2731 clearly indicated that OSHA's EAJA record is typical. The Majority contends, as have the proponents of this legislation in previous Congresses, that EAJA has been underutilized, that it has been judicially interpreted contrary to congressional intent, and that it has failed.

H.R. 2731 penalizes a government agency, an agency coincidentally charged with protecting workers' rights, every time it loses regardless of how meritorious the action of the agency was. Under EAJA, the government must pay the prevailing party's fees and costs only in those situations in which the government's position was not "substantially justified," or where "special circumstances" would make fee-shifting unjust.<sup>[5]</sup> Thus, Congress has never seen fit simply to shift the financial burdens of litigation to the government when it does not prevail, without regard to the merits of the government's position. Nor can it conjure up any reason whatsoever to single out proceedings involving OSHA for imposition of such a rule.

Furthermore, there is no data to back the characterization that small businesses have underutilized EAJA with respect to administrative and judicial actions under the OSH Act. According to a 1999 GAO study, the Department of Labor ranked fifth out of 15 Federal agencies, in the number of judicial decisions issued with respect to EAJA applications in FY '94. Specifically, OSHA awarded approximately \$192,494 in EAJA fees during fiscal years 1987-1997, in 28 cases. This amounts to an average EAJA award of \$6,874, a statistic which hardly demonstrates that employers, small or large, have spent huge sums of money in defense of frivolous suits under the OSH Act.

## **Implementation of H.R. 2731 Will Further Frustrate the Ability to Protect The Rights of Workers**

This legislation punishes OSHA for bringing actions that are substantially justified but which the agency fails to win in whole. Coincidentally, the agency that H.R. 2731 chooses to so punish is an agency charged with protecting the rights of workers. H.R. 2731's chilling effect on the willingness of OSHA to bring actions on behalf of workers is obvious. This is particularly troubling in light of the fact that the OSH Act does not afford workers a private right of action. Thwarting the ability of OSHA to bring actions on behalf of workers is, therefore, tantamount to denying workers any recourse in law.

We strongly believe that workers should have an enforceable right to secure a safe and healthy workplace. H.R. 2731 impedes that objective. By leaving workers with the legal claim of the right to a safe and healthy workplace, while denying workers a meaningful ability to enforce that claim, H.R. 2731 invites disrespect for the law and for the institutions that make and enforce the law. H.R. 2731 does not simply undermine the rights of working men and women; it does a disservice to fundamental principles of law and justice.

1. [George Miller, Ranking Member \(CA-07\)](#)
2. [Dale Kildee \(MI-05\)](#)
3. [Major Owens \(NY-11\)](#)
4. [Donald Payne \(NJ-10\)](#)
5. [Robert E. Andrews \(NJ-01\)](#)
6. [Lynn Woolsey \(CA-06\)](#)
7. [Ruben Hinojosa \(TX-15\)](#)
8. [Carolyn McCarthy \(NY-04\)](#)
9. [John Tierney \(MA-06\)](#)
10. [Ron Kind \(WI-03\)](#)
11. [Dennis Kucinich \(OH-10\)](#)
12. [David Wu \(OR-01\)](#)
13. [Rush Holt \(NJ-12\)](#)
14. [Susan Davis \(CA-53\)](#)
15. [Betty McCollum \(MN-04\)](#)
16. [Danny Davis \(IL-07\)](#)
17. [Ed Case \(HI-02\)](#)
18. [Raul Grijalva \(AZ-07\)](#)
19. [Denise L. Majette \(GA-04\)](#)
20. [Chris Van Hollen \(MD-08\)](#)
21. [Tim Ryan \(OH-17\)](#)
22. [Timothy Bishop \(NY-01\)](#)

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<sup>[1]</sup> See U.S. Census Bureau, Statistics of U.S. Businesses, internet:<http://www.census.gov>.

<sup>[2]</sup> 29 U.S.C. 630 (b).

<sup>[3]</sup> See Data From The Office of the Solicitor For Records, U.S. Department of Labor, 1998.

<sup>[4]</sup> 5 U.S.C. at 504 (EAJA).

<sup>[5]</sup> *Id.* at 504(a)(1).